**California Pie Company, Inc. *and* Bakery, Confectionery, and Tobacco Workers International Union, AFL–CIO, Local 125 *and* Ricardo Pena.**
Cases 32–CA–16411 and 32–CA–16435

November 8, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 30, 1999, Administrative Law Judge William L. Schmidt issued the attached decision. The Charging Party Union filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, California Pie Company, Inc., Livermore, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Local 125, Bakery, Confectionery, and Tobacco Workers International Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative for employees in the following appropriate unit:

> All full-time and regular part-time production, maintenance, sanitation, and shipping and receiving employees, including truck drivers and working foremen; excluding all driver-salesmen, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT coercively interrogate employees concerning the substance of their discussions with their shop steward.

WE WILL NOT issue written warnings to employees in order to discourage their activities on behalf of the Union.

WE WILL NOT limit after-shift access by the Union's shop steward to the lunchroom in order to interfere with union or concerted activities of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw our industry standards proposal in any future negotiations with the Union over the terms of a collective-bargaining agreement.

WE WILL promptly provide the Union with all requested information pertaining to Nelly Benitez' August 1997 warning.

WE WILL bargain with the Union about Manuel Zuniga's August 1997 grievance and Nelly Benitez' August 1997 warning.

WE WILL rescind the limitation imposed on November 7, 1997, concerning after-shift access by the Union's

[1] The Charging Party Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No party has excepted to the judge's findings that the Respondent violated Sec. 8(a)(1), (3), and (5) of the Act. The Charging Party Union, however, has excepted to the remedy recommended by the judge for his finding that the Respondent insisted to impasse on an unlawful "most favored nations" (MFN) proposal. Specifically, the Charging Party Union contends that, in light of the testimony of International Representative Marco Mendoza that the Charging Party Union offered to accept the Respondent's final offer without the MFN proposal, the Respondent should be ordered to sign the collective-bargaining agreement without the MFN proposal or be required to leave on the table for a reasonable period of time the Respondent's final offer without the MFN clause, so that the Union may bargain from that position.

We find no merit in the Charging Party Union's exception. First, the judge did not credit Mendoza's testimony, but rather found that the Union had also rejected another provision in the Respondent's final offer. Second, even if the Union had been willing to accept the Respondent's offer without the MFN proposal, this would not warrant finding that the Respondent would then be required to offer all the other proposals as a total contract. See *Nordstrom, Inc.,* 229 NLRB 601 (1977) (rejecting proposition that "one party to collective-bargaining negotiations can effectively conclude negotiations by agreeing only to those demands of the other party which constitute mandatory subjects of bargaining"). Accord: *Aztec Bus Lines*, 289 NLRB 1021, 1024 (1988). Finally, the cases on which the Charging Party Union relies for its proposed remedy—*H.J. Heinz*, 311 U.S. 514 (1941); *Sunol Valley Golf Club*, 310 NLRB 357 (1993), enfd. sub nom. *Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995); and *Northwest Pipe & Casing Co.,* 300 NLRB 726 (1990)—are distinguishable, because all of them involved either an employer's refusal to sign a contract on which the parties had reached agreement or an employer's unlawful withdrawal of a complete contract proposal in order to avoid the union's acceptance of it.

shop steward to the lunchroom and notify the Union in writing that this action has been taken.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, any reference to the written warning issued to Ricardo Pena on October 27, 1997, and WE WILL, within 3 days thereafter, notify Pena in writing that we have done so and that we will not use the warning against him in any way.

CALIFORNIA PIE COMPANY, INC.

*Jeffery Henze, Esq*., for the General Counsel.
*J. Mark Montobbio, Esq. (Ragghianti, Freitas, Montobbio & Wallace),* of San Rafael, California, for the Respondent.
*David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld),* of Oakland, California, for the Charging Parties.

## DECISION

### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Oakland, California, on May 18, 1998. Bakery, Confectionery, and Tobacco Workers International Union, AFL–CIO, Local 125 (the Union or Local 125) filed the charge in Case 32–CA–16411 on October 14, 1997,[1] and Ricardo Pena, an individual, filed the charge in Case 32–CA–16435 on October 30. The Union amended its charge on January 29, 1998, and the following day the Regional Director for Region 32 issued a consolidated complaint (complaint) alleging that California Pie Company, Inc. (Respondent or Company) engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act. At the outset of the hearing, the General Counsel amended the complaint to allege that Respondent engaged in a further unfair labor practice within the meaning of Section 8(a)(1) and (5). Respondent filed a timely answer denying that it engaged in the unfair labor practices originally alleged and, at the hearing, it denied that it engaged in the additional unfair labor practice alleged in the General Counsel's amendment.

The complaint alleges that Respondent independently violated Section 8(a)(1) by interrogating an employee about his union activities, threatening an employee with a job warning for participation in union activities, and by imposing an unlawful plant access rule. The complaint further alleges that Respondent violated Section 8(a)(3) by issuing a written warning to Pena. Finally, the complaint, as amended, alleges that Respondent violated Section 8(a)(5) by: (1) refusing to discuss an employee grievance with the Union because the employee had filed an unfair labor practice charge with the Board; (2) refusing to discuss a warning issued to another employee because the employee had filed a charge with the Equal Employment Opportunity Commission; (3) unilaterally imposing the new plant access rule; (4) insisting to impasse in collective-bargaining negotiations over a permissive subject of bargaining, i.e., a "most-favored-nations" provision containing an indemnification clause and a clause geographically overbroad in scope; and (5) refusing to furnish the Union with information related to a warning letter Respondent had issued to an employee.

On the entire record, including my observation of the witnesses who testified and after carefully considering the briefs filed by the General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a Texas corporation, with an office and place of business at Livermore, California, is engaged in the nonretail production and distribution of pies and related products. During the 12-month period preceding the issuance of the complaint, Respondent's direct outflow exceeded the amount established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this labor dispute.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### *A. Background*

As noted, Respondent manufactures and distributes pies at its Livermore facility, which are sold under various labels in markets and stores. In May 1994, the Board certified the Union as the exclusive collective-bargaining representative for the following unit of Respondent's Livermore employees then comprised of about 55 workers:

> All full-time and regular part-time production, maintenance, sanitation, and shipping and receiving employees, including truck drivers and working foremen; excluding all driver-salesmen, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

Over the course of the extensive negotiations that followed the Union's certification the Union's bargaining committee consisted of International Vice President Randy Roark, the Union's chief spokesperson, International Representative Marco Mendoza, Local 25 Business Agent Donna Scarano, and Manuel Zuniga, a company employee chosen as the Union's plant steward following the election. Respondent's bargaining committee consisted of Paul Finkle, a labor relations consultant who acted as the Company's chief spokesperson, Company President Bill Reynolds, Company Vice President Bill Fenimore, Human Resources Director Diana Saldana, and the plant manager. By the final session the plant manager was Jerry Perez. The last of the 38 bargaining sessions held by the parties occurred on November 7, 1997. Between face-to-face sessions, the parties exchanged considerable correspondence and proposals but ultimately they had not reached an agreement by the time of the hearing.

During the lengthy period of negotiations numerous routine grievances arose. Although no formal grievance procedure existed, the Union began memorializing those grievances in written form at some unspecified time. Typically Plant Steward Zuniga presented them to Human Resources Director Saldana, although on a few occasions others prepared and submitted grievances. Over time Zuniga estimated that he filed about 40 grievances. Although the disposition of most are unknown, management and union officials met on occasion to discuss current grievances.

[1] Where not shown, further dates refer to 1997.

*B. The Pena Warning*

1. Facts

Ricardo Pena, a second shift utilityman in the shipping and receiving department, worked from noon to 9 p.m. during the fall of 1997. His primary duties involved loading and unloading trucks. During each shift, Pena and all other employees receive two 15-minute breaks, a half-hour lunchbreak, and restroom breaks as needed. Pena and other similarly situated employees have no break schedule; they simply take their 15-minute breaks whenever their workload permits. In addition, employees such as Pena need not obtain supervisory authorization to take either their regular breaks or restroom breaks and they are not required to obtain a replacement employee for times when they are absent on break.

On October 17, 1997, Pena filed a written grievance protesting Respondent's assignment of overtime to two junior workers. On October 27, when Pena took his first 15-minute break at 2:45 p.m., he saw Union Steward Zuniga, who had just finished his work shift, at a drinking fountain near the lunchroom entrance. Pena waived at Zuniga to come with him to the lunchroom. Thereafter, the two men talked until a few minutes before 3 p.m. when Saldana approached and told Zuniga that she was ready for their previously scheduled meeting in her office.[2] Zuniga asked if Saldana would "[j]ust give me one minute," that he would come to her office when he finished speaking with Pena. Saldana left and the two men continued their discussion only for brief moments. As he left the lunchroom with Pena, Zuniga claims that he noticed that, by the lunchroom clock, the time was 2:58 p.m.

Zuniga proceeded directly to Saldana's office and Pena went to a nearby restroom where, by his credible estimate, he remained for 3 or 4 minutes. On leaving the restroom, Pena saw a pallet of dirty trays in the vicinity of a nearby freezer area and moved them to the fruit cook area where he spent about 4 or 5 minutes washing the trays.[3] Pena then walked back to his regular work area.

In the meantime, after Saldana left the lunchroom she stopped at the office of Shipping and Receiving Supervisor Rudy Alvarado enroute to her own office. Saldana reported to Alvarado that she had seen Pena in the lunchroom and asked if he was on a break. Alvarado told her he did not know but that he would find out. Instead of going directly to the nearby lunchroom, Alvarado proceeded out on to the plant floor and proceeded in a circuitous route around the facility to the shipping and receiving area. When Pena returned, Alvarado asked him what he had been doing in the lunchroom. After Pena told Alvarado that he had been there talking with Zuniga, Alvarado asked what he had been talking to Zuniga about but before Pena answered Alvarado cautioned him to "be careful because warnings were coming up." Pena did not respond.

About 15 minutes later, Alvarado summoned Pena to his office and gave him a written warning that states: "You were observed in the breakroom from 2:43 to 3:10 p.m. on 10/27/97. Company allows 15 minutes break only." Pena, asserting that the substance of the warning was untrue, refused to sign it as is customary. Although Alvarado initially claimed that he went to the lunchroom promptly after Saldana spoke to him and then personally observed Pena leaving the lunchroom at 3:10 p.m., he subsequently contradicted this account. For that reason, I credit the account provided by Pena and Zuniga concerning the duration of Pena's break on this occasion.[4] During the 1997, Respondent issued no other warnings alleging employee abuse of the allotted breaktime.

2. Conclusions

The General Counsel argues that Alvarado's questioning of Pena on his return from his break amounts to unlawful, coercive interrogation. Respondent, relying on Alvarado's testimony, which I do not credit, claims that the questioning never occurred. I find that Respondent violated Section 8(a)(1), as alleged, when Supervisor Alvarado confronted Pena and asked what Pena had been talking with Zuniga about. Alvarado's concurrent caution concerning warnings obviously removed his question to Pena from the realm of a legitimate or innocent inquiry. Having once learned that Pena had been talking to Shop Steward Zuniga, Alvarado's pursuit of the matter in an effort to learn what Pena had discussed with Zuniga, together with the warning caution, amounts to coercive interrogation.[5]

I further find that the General Counsel, as required under the *Wright Line,* 251 NLRB 1083 (1980), established a prima facie case that Pena's warning was discriminatory. Thus, it was established that Pena had filed his first grievance only 9 days earlier and was observed speaking with Shop Steward Zuniga immediately prior to the issuance of the warning. On his return from break, Supervisor Alvarado questioned Pena as to his discussion with Zuniga in violation of Section 8(a)(1). Shortly thereafter, Alvarado issued the disputed warning to Pena. I further find that the basis for the warning—that Pena had exceeded the allotted breaktime—simply is not truthful. Respondent's failure to provide a truthful explanation for this action lends further support to the conclusion that the warning was issued for discriminatory reasons. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Moreover, as Respondent relied exclusively on Alvarado's discredited testimony to explain the action against Pena, I find that it has failed to meet its *Wright Line* burden to establish that the same action would have been taken even in the absence of Pena's protected activity. For these reasons, I conclude that Pena's October 27 warning violated Section 8(a)(1) and (3), as alleged.

[2] The Saldana–Zuniga meeting had been arranged to discuss some pending grievances.

[3] Pena testified without contradiction that his work duties include washing dirty trays.

[4] Neither Pena nor Zuniga gave any indication that they saw Alvarado while in the lunchroom and Alvarado gave no indication that he spoke to Pena in the lunchroom. As Saldana admittedly called Alvarado's attention to Pena's presence there and purported assured her that he would find out if Pena was on break, I find it highly improbable that he would have not spoken to Pena if he actually went to the lunchroom. According to both Pena and Zuniga, Saldana first appeared in the lunchroom just after 2:55 p.m. Respondent's prehearing account of this incident (G.C. Exh. 4) is also at odds with Alvarado's conflicting accounts at the hearing. Hence, I do not credit Alvarado's testimony where it conflicts with any other witness.

[5] The General Counsel alleged the warning threat as a separate 8(a)(1) violation. Viewed in the context of the conversation as it occurred, I find that the warning threat was an integral part of and merged with the interrogation, contributing to its coercive character. For that reason, I find it unnecessary to make an independent finding as to this threat and, therefore, I will not treat with the threat allegation further.

*C. The Access Rule*

1. The facts

Through the latter part of 1997, Union Steward Zuniga's work shift normally concluded between 2:15 and 2:45 p.m. Following the end of his shift, Zuniga often remained at the Company's premises and spoke to other employees reporting for work, leaving work, or on break in the plant cafeteria or in the parking lot. Although other employees did likewise, no evidence shows that the frequency or length of their afterwork stays approximated Zuniga's. As his discussion with Pena indicates, Zuniga's admitted purpose remaining on the Company's premises was to discuss matters pertaining to the Union, including grievances and the ongoing collective-bargaining sessions that he attended. The length of Zuniga's after-work stays varied from 15 to 45 minutes. Numerous management and supervisory officials had ample opportunity to observe him during these times as they also used the lunchroom or passed that location in the course of their own work. No claim is made that any manager or supervisor ever attempted to interfere with or prohibit Zuniga's activity until November 7 or that they engaged in unlawful surveillance of his activities at any time.

At the November 7 bargaining session, the first such session following Pena's warning, the Company, asserting that it had an "agenda," started by addressing Zuniga's practice of conducting "union business" on the Company's premises after his shift ended, admittedly because of Pena's grievance about his October 27 warning. Initially, Finkle and Company CEO Fenimore told the union negotiators that the Company wanted Zuniga to punch out and leave the facility immediately following the conclusion of his shift because "someone" (obviously referring to Pena) failed to timely return from a break after meeting with Zuniga in the lunchroom. When Union Negotiator Roark inquired as to whether the Company had a rule requiring employees to leave immediately, one of the Company's negotiators admitted that the only existing rule related to punching in before the start of the work shift.

After returning from a company caucus, Fenimore told the union negotiators that it would be okay for Zuniga to remain at the lunchroom following his shift provided he first obtained management permission to use the room. Finkle added that on-duty employees who talked with Zuniga at such times would not be "exempt" from adhering to their regular schedule. Roark told the company negotiators that the Union would not agree to this requirement if the Company was, in effect, targeting Zuniga or the people who talked to him. Finkle denied that the Company was "targeting" anybody. Instead, he said: "[W]e're just saying if someone wants to use the company's facilities, do us the curtesy [sic] of asking permission. That's all. And reserving them, and we won't withhold them unreasonably." Finkle thought that resolved the issue and, according to him, there "hasn't been an issue since." Although none of the General Counsel's witnesses contradicted his assertions, there is likewise no other evidence that Roark withdrew his previously stated objections to this requirement.

2. Conclusions

As noted, the General Counsel alleges that the Respondent's requirement that Zuniga seek permission to remain in the lunchroom is tantamount to an overly broad no-solicitation rule, imposed without prior notice and an opportunity for the Union to bargain about it. Respondent sees its lunchroom rule as a nondiscriminatory access question and asserts that it provided the Union with an opportunity to bargain over the matter.

I find that the limitation at issue here relates essentially to after-hours plant access by off-duty employees rather than to the substantive aspects of a no-solicitation, no-distribution rule. In general, employer-imposed plant access limitations are valid if they (1) limit access solely with respect to the interior of the plant and other working areas; (2) are clearly disseminated to all employees; and (3) apply to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Tri-County Medical Center*, 222 NLRB 1089 (1976).

Quite plainly, the limitation at issue here pertains to an interior area of the plant. However, I concur with the General Counsel's contention that Respondent imposed limits on Zuniga's after-duty contact with other employees in order to interfere with his union activities and in violation of its duty to bargain. Respondent admits that its new after-hours lunchroom access rule arose out of the October 27 warning issued to Pena which I have found to be unlawful. Although Respondent modified the limitation substantially in response to the Roark's inquiries at the November 7 bargaining session, no claim has been made and no evidence shows that it deferred its expectations of compliance by Union Steward Zuniga, the only person unmistakably pinpointed by Respondent with the rule that eventually evolved, i.e., that he seek permission to use the lunchroom for afterwork "meetings" with other employees. Hence, the timing and stated purpose of this requirement coupled with the lack of any evidence that Respondent sought to give any wider application or notice of this limitation to other employees strongly support the conclusion that this limitation was, in fact, directed at interfering with Zuniga's activities alone. Again, Respondent failed to show that this limitation would have been adopted absent Zuniga's protected activity. Accordingly, I find that this limitation was adopted to interfere with Zuniga's legitimate protected activities and that it violated Section 8(a)(1) as alleged. *Tri-County Medical Center,* supra. Furthermore, as no evidence shows that the Union, in clear and unmistakable terms, ultimately acquiesced in the implementation of this limitation against Zuniga at the November 7 bargaining session, I have concluded that Respondent also violated Section 8(a)(1) and (5), as alleged.

*D. The Zuniga and Benitez Grievances*

1. The facts

In mid-August 1997, Respondent issued unrelated disciplinary warnings to Manuel Zuniga and Nelly Benitez. Specifically, on August 15 Zuniga received a written warning charging that he had made underweight pies and on August 18 Benitez received a written warning charging that she had engaged in "verbal misconduct of a sexual nature, on many occasions, as witnessed and corroborated by those interviewed." Zuniga filed an unfair labor practice charge concerning his warning notice with the NLRB on August 20 and the following day he filed a grievance claiming that the warning lacked merit. Benitez promptly reported the disciplinary action against her to the Union and subsequently filed a charge with the Equal Employment Opportunity Commission. By a letter dated August 21, Union Business Agent Donna Scarano requested a meeting with Human Resources Director Diana Saldana to discuss Benitez' warning and also asked that Respondent provide the Union with the information supporting Benitez' warning.

Scarano met with Plant Manager Jerry Perez and Saldana on August 28. In the course of their meeting, Scarano asked to discuss the Zuniga underweight pie grievance but Saldana told Scarano that she "could not talk . . . about [that] grievance, as [Zuniga] had filed with the NLRB." When Scarano pressed the matter, Saldana stated that she "had been told that she could not discuss it, and it was in the hands of their attorney." In that same meeting, Scarano also asked to discuss the Benitez warning and requested to see the information in Respondent's possession supporting it. Saldana told Scarano that it would be necessary for her to first obtain a signed release from Benitez before any information would be provided to the Union about that warning.

Following this meeting, Scarano wrote to Saldana on September 4 to confirm what she had been told in the August 28 meeting about the Zuniga grievance, i.e., that "[t]he Company does not wish to respond [to the Zuniga grievance] as . . . Manuel has filed with the NLRB and its [sic] in the hands of their attorney." On that same date Scarano obtained a written release from Benitez. On September 11 Scarano sent the release to Saldana and asked for another meeting to discuss Benitez' warning plus the underlying information in Respondent's possession supporting that warning. Saldana never responded to Scarano's letter about Zuniga but on September 16, she partially responded to the Union's letter about Benitez. In that letter, Saldana acknowledged receipt of the release but advised Scarano that Respondent would not release any information to the Union because Benitez had filed a charge with the EEOC about the warning. That letter makes no reply to Scarano's requested meeting concerning the Benitez warning. Subsequently, Respondent has never provided the requested information related to the Benitez warning and no further discussions ever occurred between Respondent and the Union concerning either warning.

2. Conclusions

Respondent's brief argues that these refusal to bargain allegations pertaining to Zuniga and Benitez should be dismissed because "the individuals had chosen to go to governmental agencies to resolve their disputes." I reject that claim. Even in the absence of a collective-bargaining agreement, an employer has a duty to bargain with its employees' representative concerning disciplinary matters. *Crestfield Convalescent Home*, 287 NLRB 328 (1987). Moreover, an employer's duty to bargain also encompasses an obligation to furnish the employee representative with relevant information necessary for it to bargain over employee grievances. *Hobelmann Port Services*, 317 NLRB 279 (1995). The Board deems information about employees actually represented by a union as presumptively relevant. *Hobelmann,* supra Respondent made no effort to rebut that presumption. Moreover, Respondent's obligation to bargain is unaffected by the independent action of the employees in seeking the aid of government agencies to secure redress for the disciplinary actions against them. *Zenith Radio Corp.*, 187 NLRB 785 (1971). Accordingly, I find that Respondent violated Section 8(a)(1) and (5), as alleged, by refusing to discuss the Zuniga and Benitez grievances with the Union and by failing to furnish the Union with information requested by it concerning the Benitez grievance.

*E. The Most-Favored-Nations Clause*

1. The facts

Commencing with the bargaining session held on August 7, 1995, Respondent's comprehensive collective-bargaining agreement proposal included the following section dubbed by the parties as the "Most-Favored-Nations" (MFN) clause:

SECTION 18. INDUSTRY STANDARDS

> In the event that any separate Agreement is entered into between the Union and any other Employer which contains provisions more favorable to the Company than the corresponding provisions of this Agreement, then such provision shall automatically be substituted for the corresponding provision of this Agreement and become a part hereof. The Union shall supply the Company with a signed copy of any such contract which grants the more favorable terms to the other Employer involved within twenty-four (24) hours of its execution. To avoid any questions as to whether the provisions of any separate agreement are more favorable to the Company than the provisions of this Agreement, the Union shall supply the Company with a signed copy of each agreement it negotiates. In the event the Union fails to properly notify the Company of "more favorable" conditions (from the Company's perspective), then the Union shall be held financially liable for any benefits in which the Company would have enjoyed had the favorable conditions been immediately implemented. This Section shall also apply to practices between the Union and any employer under contract that may be different than those wages, hours, terms and other conditions of employment established under this Agreement.

A literal reading of this provision in conjunction with the proposed Recognition clause that defines "Union" as Local 125 would not appear objectionable. But clearly, the parties never approached this proposal in any literal sense throughout the negotiations. Instead, they stipulated that, as used in this clause, the word "Union" refers to Local 125, Local 125's parent international union, and any local union affiliated with the Local 125's parent international union in the States of California, Nevada, Oregon, and Washington. They further stipulated that the provision was intended to be operative as to agreements reached with Respondent's competitors with manufacturing operations located in those four western States. As interpreted, Respondent maintained this proposal in unchanged form throughout all bargaining, which transpired after that August 1995 session.[6]

As noted, Local 125 is the certified representative of Respondent's employees. Historically, Local 125 has represented only employees of employers in the Bay Area Metropolitan area. Local 125 has no control or authority over agreements negotiated by a number of other sister local unions that operate in other geographic areas in the four States that would be covered by Respondent's MFN proposal. No representatives of Local 125 participate in the negotiations of other local unions and it has no authority to veto an agreement another local might

[6] As originally proposed, apparently no mention was made of the applicability of the provision to competitors and locals in Nevada. Instead it appears that this addition was made at the 38th bargaining session on November 7, 1997.

negotiate. In fact, Local 125 has no established procedure that would permit it to learn the agreements negotiated by other local unions. Although nothing in Local 125's charter would prohibit it from representing employees of employer's outside the geographic area it has historically served, practical considerations would preclude it from regularly servicing such agreements.

From the outset, the Union adamantly refused to agree to Respondent's MFN proposal but the parties also remained divided over a number of other significant issues throughout nearly 30 bargaining sessions that were held by September 1996. Finally, in a letter dated September 18, 1996, after receiving notice that the unit employees had rejected Respondent's "final offer" and voted to go on strike, Respondent's negotiator, Finkle, wrote to Union Negotiator Roark advising that, on September 22, the Company would implement portions of a final offer made to the Union on September 11.

In an letter dated September 20, 1996, labeled "urgent," Union Attorney Rosenfeld protested that several portions of Respondent's final offer contained nonmandatory subjects of bargaining and signified the Union's willingness to modify its position on several subjects including, for the first time, the MFN provision. However, Rosenfeld asked that the parties schedule a prompt meeting to discuss outstanding issues and requested information concerning certain subjects. In a September 23 response, Finkle continued to claim that the parties were at an impasse but agreed, nevertheless, to meet with the union negotiators as Rosenfeld requested on September 26. In correspondence following that meeting, Finkle requested that Rosenfeld put in writing numerous information requests Rosenfeld apparently made at that meeting.

This triggered a lengthy response from Rosenfeld, keyed apparently to Respondent's explanation about the anticipated operation of the MFN clause in practice. In a letter dated October 2, Rosenfeld requested that Respondent furnish information specifically identifying Respondent's competitors and the geographic areas of their competition, information as to Respondent's corporate parent and all subsidiaries together with information about the products produced, information about Respondent's distributors and the dollar amount of product each sold in the affected areas,[7] and information about Respondent's production costs and pricing structure, including any discounting practices for each of the products covered under the MFN proposal. (GC Exh. 2(h).)

Respondent never provided this detailed financial information sought by the Union. Instead, the parties continued to quibble over the information as well as the provision for the next 13 months both in their correspondence and at the bargaining table. Finkle's April 3, 1997 letter sums up the Respondent's view of its MFN proposal and its position concerning Rosenfeld's exhaustive requests for financial information to evaluate the need for the proposal:

> To clarify the intent of the Employer's [MFN] proposal, the Company believes that this clause would cover any agreements which the [International] Union, or any of its Locals, might enter into with employers operating in California, Oregon and Washington. The Company currently conducts business in these States. A further logical refinement of the meaning of this clause is that the Employer is only concerned with contracts, and terms and conditions it might grant its competitors. California Pie Company defines a competitor as any company that produces the below-listed products:
>
> - Fried turnover snack pies (fruit-filled and cream-filled)
> - Snack cakes, cupcakes and cream-filled cake snacks
> - Mini doughnuts
>
> This is the only relevant information you need to determine the Union's liability under the meaning of this clause. Obviously, the Union has contracts with many employers in the bread and baking industry with whom California Pie Company is not concerned since it does not compete with those employers. Again, to determine its liability, the Union needs only to review agreements with employers who produce any of the above–listed products in the above-listed states. [See G.C. Exh. 2(x).]

As noted, the parties' last bargaining session was held on November 7, 1997. Marco Mendoza, the international representative present at that session with the union negotiators, claims that the Union offered to accept Respondent's existing final offer if Respondent would take the MFN proposal "off the table" but the Respondent's negotiators refused to do so. Local 125 representative Scarano also claims that occurred. In fact, her notes of that meeting offered in evidence by Respondent reflect that Union Negotiator Roark, in response to an inquiry from Finkle as to whether the Union had an offer, stated: "Only if you drop your industrial standards we could have a contract . . . I am offering again if you drop standards we agree on contract as now if not everything goes back." Subsequently, however, Scarano's notes reflect that Roark demanded that that Respondent at least also drop the zipper clause (sec. 21). Finkle denies that the union negotiators ever proposed to accept the all of the Company's offer save for the MFN clause.

2. Conclusions

The General Counsel argues that by adhering adamantly to its MFN proposal, Respondent has insisted to impasse on a nonmandatory subject of bargaining. He contends that this particular clause is a nonmandatory bargaining subject for two reasons. First, the scope of the clause is simply too broad because Respondent seeks to apply it to all contracts negotiated by the Union's parent or any sister locals with competitors in four western States. Second, the clause's financial reimbursement requirement in the event of the Union's failure to give timely notice of more favorable terms amounts to a nonmandatory indemnification provision. The General Counsel analogizes this proposal to that in *Columbus Printing Pressmen*, 219 NLRB 268 (1975), where the Board found an interest arbitration clause to be a non-mandatory subject of bargaining and to that in *Arlington Asphalt*, 136 NLRB 742 (1962), where the Board held that an indemnification clause was not a mandatory subject of bargaining. Finally, the General Counsel argues that the MFN proposal need not be the sole cause of the parties' impasse for the Act to have been violated so long as it was "one of the subjects preventing agreement on a contract." In support of that proposition, the General Counsel cites *Walnut Creek Honda*, 316 NLRB 139 (1995); and *Westvaco Corp*., 289 NLRB 301 (1988).

[7] In his letter, Rosenfeld asserted that Respondent expected to apply the MFN clause in areas where its distributors encountered products of competitors.

In its brief, Respondent does not take issue with the General Counsel's claim that the MFN clause is a nonmandatory subject of bargaining or that the parties are at an impasse. Instead it argues that the General Counsel failed to prove that the parties' impasse resulted solely from their disagreement over the clause or that the clause was even the dominate issue that produced their impasse. In effect, Respondent argues that General Counsel misreads *Walnut Creek Honda*, supra. In Respondent's view, the Board held in that case that the impasse must result from a nonmandatory subject that is the dominant issue dividing the parties. Citing a letter received from the Union dated November 17, 1997, Respondent claims that the employees rejected its final offer due to substantial differences over numerous significant proposals including wages, the length of the agreement, MFN, the zipper clause, pensions, and health and welfare. Moreover, Respondent contends that Mendoza's claim that the Union proposed to accept Respondent's entire final offer sans the MFN provision is not credible. On this point, Respondent asserts that the parties' extensive correspondence and Scarano's "*copious notes*" of the November 7 bargaining session both dispute Mendoza's claim.

In *Dolly Madison Industries*, 182 NLRB 1037 (1970), the Board held that MFN clauses providing that an employer would automatically receive the benefit of any contract the employee representative signed with a competitor that contained more favorable terms regarding wages, hours, and working conditions is a mandatory subject of bargaining. But unlike the situation in *Dolly Madison*, Respondent seeks the right to apply more favorable terms negotiated with competitors by the Union's parent and sister locals as well as the Union itself throughout four western States. As it emphasized many times in negotiations, Respondent seeks by this provision to prevent its competitors from gaining an advantage through a labor agreement they are able to negotiate with the Union or other labor organizations related to the Union.

I am unable to accept Mendoza's claim that the Union actually offered on November 7 to accept Respondent's final offer if it dropped only the MFN proposal. Aside from Finkle's denial that that ever occurred, Scarano's notes suggest that Roark, when pressed for details, also asked that Respondent drop at least the proposed zipper clause, i.e., section 21. Furthermore, I note that the General Counsel makes no such claim in his brief and the remedial action sought by the General Counsel is inconsistent with the claim that the Union ever agreed to accept all aspects of Respondent's final offer but for the MFN provision.

However, in my judgment, Respondent's novel MFN proposal seeks to sweep away basic safeguards provided to employees under the Act concerning the selection of their representative for the purposes of collective bargaining. Unlike the interest arbitration clause the General Counsel finds analogous, the terms and conditions of employment of the unit employees negotiated by the representative they actually chose to represent them is subject at all times under this proposal to the actions of numerous entities which the employees did not select and in which they have no right to participate *even through their own designated representative*. Viewed in this manner, Respondent's MFN provision cannot be reconciled with the Act's fundamental concept of exclusive representation by an agent freely chosen by a majority of the employees in an appropriate unit. *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975). In my judgment, this provision is entirely distinguishable from the recognition proposal found in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). In that case, the employer's recognition clause provided only for recognition of a subordinate local union even though the parent international union had been certified. While the *Borg-Warner* court characterized the recognition clause as outside the scope of mandatory bargaining, it also observed that such a clause would be "lawful in itself" because "the Act does not prohibit the voluntary addition of a party." But here, Respondent's MFN proposal would not add any other labor organization as a recognized party. Instead, it would bind the certified representative to the acceptance of contractual terms negotiated elsewhere by other uncertified labor organizations, thereby diluting Local 125's exclusive status and depriving employees of the right to an exclusive representative guaranteed by Section 9 of the Act.[8]

An arrangement that effectively vests control over the terms and conditions of employment in an entity or entities not actually selected by a majority of the affected employees plainly implicates the prohibitions in Section 8(a)(1) and (2) and Section 8(b)(1)(A) against the recognition of minority labor organizations. *Garment Workers (Bernhard Altman)*, 366 U.S. 731 (1961); *Newell Porcelain Co.*, 307 NLRB 877 (1992). Moreover, even a certified labor organization lacks the right to contractually waive the core statutory rights of employees as to the selection of their own bargaining agent. *NLRB v. Magnavox Co.,* 415 U.S. 322 (1974). Although it might be argued that employee ratification of an agreement containing this sweeping proposal would be tantamount to consenting to this form of continuous outside representation, it would it be unreasonable in my judgment to presume employee consent to such broadened representation as a matter of law from ratification alone. Labor organizations can and frequently do limit contract ratification votes to members only and other contractual terms, fleeting though they might be under this proposal, could well serve as a ratification inducement.

Therefore, I find that Respondent's MFN proposal, given its intended scope, is unlawful, and not merely a permissive subject of bargaining as claimed, because it seeks to substantially alter the character of exclusive representation provided for in Section 9 of the Act. In view of Respondent's lengthy insistence that this proposal be included in any agreement reached, I have concluded that Respondent violated its duty to bargain in good faith under Section 8(a)(5) and (d) of the Act. *Longshoremen Local 1367 (Galveston Maritime)*, 148 NLRB 897 (1964). Because I have concluded that Respondent's MFN proposal seeks to unlawfully strip Local 125 of its status as the exclusive bargaining representative, I find the degree to which this proposal may have contributed to the parties' impasse irrelevant.[9]

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[8] Sec. 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

[9] To allievate any possible confusion, I note that Roark's participation in the negotiations is not inconsistent with these findings to the extent that he acts as Local 125's agent. To the extent that he acts otherwise, it might be improper. See, e.g., *Newell Porcelain,* supra.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 125 is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating Ricardo Pena and by limiting Manuel Zuniga's access to the plant lunchroom after his work shift to those occasions when he sought and obtained permission to do so, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By issuing a written warning to Ricardo Pena on October 27, 1997, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. By refusing to discuss the Manuel Zuniga's August 1997 grievance and Nelly Benitez' August 1997 warning with Local 125; by refusing to provide the Union with information requested concerning Benitez' warning; by unilaterally adopting a requirement limiting Manuel Zuniga's access to its lunchroom after his work shift to those occasions when he sought and received permission for its use; and by proposing, insisting upon, and refusing to withdraw an unlawful "Industry Standards" proposal during collective bargaining with Local 125, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my conclusion that the October 27 warning issued to Pena was unlawful, my recommended order will require that Respondent rescind that warning and expunge it from Pena's personnel file and take such other action as is required under *Sterling Sugars, Inc*., 261 NLRB 472 (1982). The recommended order further requires Respondent to bargain concerning the grievances filed by Zuniga and Benitez in August 1997, the information requested by the Union as to Benitez' warning, and rescind its plant access limitation.

At the hearing, the General Counsel and Local 125 disagreed concerning the appropriate remedial action concerning Respondent's MFN proposal. Local 125's counsel asserted that a *Heinz* remedy[10] would be appropriate apparently because of Mendoza's claim that the Union offered to accept Respondent's final offer without the MFN proposal. The General Counsel, however, seeks to require only that Respondent withdraw the MFN proposal and return to negotiations in an effort to reconcile the parties' remaining differences. In view of the conclusion which I have reached that the Union never agreed to all terms proposed by Respondent but for the MFN proposal, I find the remedy requested by the General Counsel appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

## ORDER

The Respondent, California Pie Company, Inc., Livermore, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Local 125, Bakery, Confectionery, and Tobacco Workers International Union, AFL–CIO (the Union) as the exclusive collective bargaining representative for employees in the following appropriate unit:

> All full-time and regular part-time production, maintenance, sanitation, and shipping and receiving employees, including truck drivers and working foremen; excluding all driver-salesmen, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) Limiting after-shift access by the Union's plant steward to its lunchroom in order to interfere with protected union activities.

(c) Coercively interrogating employees concerning the substance of their discussions with their plant steward.

(d) Issuing written warnings to employees in order to discourage their activities on behalf of the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the industry standards proposal in any future negotiations with the Union over the terms of a collective-bargaining agreement.

(b) Promptly provide the Union with all requested information pertaining to Nelly Benitez' August 1997 warning.

(c) Bargain with the Union concerning the Manuel Zuniga's August 1997 grievance and Nelly Benitez' August 1997 warning.

(d) Rescind the limitation imposed on November 7, 1997, concerning after-shift access by employees to its lunchroom and notify the Union in writing that this action has been taken.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning issued to Ricardo Pena, and, within 3 days thereafter, notify the Pena in writing that this has been done and that the written warning will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its facility in Livermore, California, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

[10] *H. J. Heinz*, 311 U.S. 514, 523–526 (1941).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.